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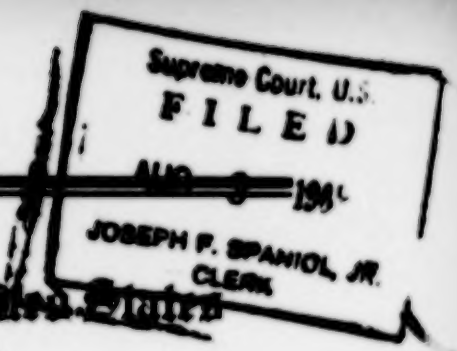

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CLYDE OSBORNE,

Appellant,

v.

OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

JOINT APPENDIX

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APPEAL DOCKETED NOVEMBER 14, 1988
JURISDICTION NOTED JUNE 26, 1989

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RELEVANT DOCKET ENTRIES

Franklin County Municipal Court

July 22, 1985	Search warrant filed.
July 22, 1985	Complaint filed.
July 22, 1985	Not Guilty Plea entered and jury trial demanded.
September 24, 1985	Excerpts of Trial Transcript
September 25, 1985	Judgment Entry: Jury Verdict: Guilty, entered.

Tenth District Court of Appeals

June 10, 1986	Judgment entry affirming conviction filed.
June 10, 1986	Opinion affirming conviction filed.
September 25, 1986	Entry certifying the case to Supreme Court of Ohio due to a conflict between appellate districts.

Supreme Court of Ohio

July 6, 1988	Judgment entry affirming conviction filed.
July 6, 1988	Opinion affirming conviction filed.
August 31, 1988	Judgment Entry denying re-hearing filed.
October 12, 1988	Entry staying execution of sentence filed.

WARRANT TO SEARCH

THE STATE OF OHIO)
FRANKLIN COUNTY) ss
CITY OF COLUMBUS)

To the Chief of Police of the City of Columbus, Ohio, Greetings:

WHEREAS, there has been filed with me an affidavit, a copy of which appears on the reverse side, these are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime into premises known as 793 North Park Street, Apt. #3, Columbus, Ohio, 43215 and to execute a search of the said premises within 72 hours after the issuance of this warrant. The said premises being in the City of Columbus, Ohio, aforesaid, and there diligently search for (the said goods, chattels, or articles), to wit: Negatives of minor children engaged in sexual activity or nudity; photos of minor children engaged in sexual activity or nudity; correspondence between Clyde Osbourne and Jack S. Smith, Daniel Knous or Century 20th Studios or P.O. Box 3054, Holiday, Florida; cancelled checks involving Clyde Osbourne, Jack S. Smith, or Century 20th Studios, and that you bring the same or any part thereof, found on such search, forthwith before me, or some other judge of this court having cognizance thereof, to be disposed of and dealt with according to law.

/s/ Marvin S. Romanoff
Judge
Franklin County Municipal Court
Columbus, Ohio
7/22/85 at 5:33 P.M.

SEARCH—WARRANT AFFIDAVIT

FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

THE STATE OF OHIO)
FRANKLIN COUNTY) ss
CITY OF COLUMBUS)

Before me, the undersigned, a Judge of Franklin County Municipal Court, Columbus, Ohio, personally appeared Det. James Phillips, CPD Child Porno Task Force who being duly sworn according to law, deposes and says that he has good cause to believe and does believe that Negatives of minor children engaged in sexual activity or nudity; photos of minor children engaged in sexual activity or nudity; correspondence between Clyde Osbourne and Jack S. Smith, Daniel Knoss or Century 20th Studies or P.O. Box 3054, Holiday, Florida; cancelled checks involving Clyde Osbourne, Jack S. Smith, or Century 20th Studies, are being kept in a certain building or room or location or known as 793 North Park Street, # 3 Apartment, Columbus, Ohio 43215 in said City of Columbus, Ohio, in violation of section 2907.321, 2907.322, 2907.323, O.R.C., as fruits, evidence or instruments.

The facts upon which such belief is based are as follows: on 7-22-85 the affiant spoke with U.S. Postal Inspector Paul M. Hartman, Cleveland, Ohio, who related the following to the affiant: On or about June 11, 1985 U.S. Postal Inspector P. M. Hartman, Cleveland, Ohio, initiated test correspondence with Century 20th Studios, P. O. Box 3054, Holiday, Florida 33590. In such correspondence Jack S. Smith, a principle in Century 20th Studios, offered Inspector Hartman various photographs depicting sexually explicit activity between adults and minors. In an Item of correspondence dated June 13, 1985, Smith wrote to Inspector Hartman:

The facts upon which such belief is based are as follows: one time I had an extensive collection of male/female action photographs, male/male action pictures, also, however, all such prints were sold out through an ad in the Advocate. I cannot have any reprints made in as much as the negatives are in possession of a friend of mine in Ohio. I had over 1,000 negatives of both hard and soft core photographs and I still retain ownership of some and, no doubt, will have them back within a short period of time. However, as suggested, please write to me and let me know what type photographs you are interested in. All models used are young—both boys and girls."

On or about July 15, 1985 Postal Inspector P. M. Hartman mailed a test letter, addressed to Box Holder, P.O. Box 3054, Holiday, Florida 33590, under cover to Postal Inspector Daniel Witouski. Such test letter contained an original U.S. Money Order issued in the amount of $14.00 pre-payment for photographs of minors engaged in sexually explicit conduct.

On or about July 17, 1985 Postal Inspector Daniel Witouski placed the above described test letter into P.O. Box 3054, Holiday, Florida and maintained visual surveillance of said P.O. Box. During the course of that surveillance, Inspector Witouski observed Jack S. Smith remove said test letter from said Post Office Box and proceed directly to Smith's residence.

Inspector Witouski and other officers maintained a continual surveillance of the Smith residence until approximately 1½ hours later when Smith emerged from the residence and entered his vehicle. Inspector Witouski continued to maintain the surveillance of the activities of Jack S. Smith and followed Smith directly to the Holiday Florida Post Office. Upon arrival at the Holiday Florida Post Office, Smith was observed by Inspector Witouski to deposit into the mails, two letters. At such

time that these observations were made, Inspector Witouski terminated the surveillance.

Inspector Witouski then made a visual observation of the mail receptacle into which Smith deposited the above described two letters. Such observation disclosed the presence of a letter bearing the return address of P.O. Box 3054, Holiday, Florida 33590 addressed to the confidential test name and address employed by Inspector P. M. Hartman in the conduct of this investigation. Inspector Witouski removed this said letter from the U.S. mails and having been so authorized by Inspector P. M. Hartman, opened said letter.

Upon opening said letter, Inspector Witouski found said letter to contain a two-page item of correspondence endorsed "Jack Smith" and 20 color photographs depicting minors below the age of 18 years engaged in sexually explicit conduct. Further searches of those photographs depicted sexual contact between minor females and an adult white male later identified by Inspector Witouski as Daniel S. Knous, also a principle in Century 20th Studios.

On or about July 19, 1985, Inspector Daniel Witouski and other officers executed a federal search warrant upon the premises of the Smith residence and arrested Jack S. Smith and Daniel S. Knous on federal charges arising from the use of the U.S. mails to distribute child pornography materials. During the conduct of the search Inspector Witouski discovered thousands of photographs depicting minors engaging in sexually explicit conduct as well as various records, papers and correspondence bearing upon the sale of such photographs.

Following his arrest, Jack S. Smith was advised of his Constitutional Rights per the Miranda decision and was questioned by Inspector Witouski as to the location whereat the photographic negatives, which were the source of such photos was secreted. Smith responded "they're with a friend of mine in Ohio named Clyde."

Similarly, Daniel S. Knous was advised of his Constitional Rights following his arrest and was also questioned by Inspector Witouski concerning the location whereat the photographic negatives from which such photographs had been produced were secreted. Knous related to Inspector Witouski that all such negatives were in possession of an associate of Smith's named Clyde Osborne, who resides in the Columbus, Ohio area.

During the conduct of the execution of said search warrant, Inspector Witouski located various mailing lists, one of such mailing lists including the name address of Clyde Osborne, 793 North Park Street, #3, Columbus, Ohio 43215.

Further, on the morning of 7-22-85, while reviewing evidence seized incident to the execution of a federal warrant at the Smith residence, Inspector Witouski located a cancelled, personal check, authored by Jack S. Smith and made payable to Clyde Osborne in the amount of $3.50 dated 6-3-85. A review of the reverse of said cancelled check disclosed that the address of 793 North Park Street, # 3, Columbus, Ohio 43215, was inscribed thereon. Further, a review of said cancelled check disclosed that said check was cashed at Christie's Market, 680 North High Street, Columbus, Ohio telephone 224-1508.

/s/ Det. James A. Phillips 717
Police officer

Sworn to before me and subcribed in my presence this 22nd day July, A.D. 1985,

/s/ Marvin S. Romanoff
Judge
Franklin County Municipal Court
Columbus, Ohio
7-22-85
5:25 p.m.

COMPLAINT

CASE # 14333

FRANKLIN COUNTY MUNICIPAL COURT

STATE OF OHIO

vs.

CLYDE J. OSBORNE
793 N. Park St. Columbus, Ohio
M/W 6'00" 220# Gry/Brn 3/8/24

Charge Possession of Child Pornography

THE STATE OF OHIO)
FRANKLIN COUNTY) ss
CITY OF COLUMBUS)

Complainant being duly sworn states that Clyde J. Osborne at Franklin County Ohio, on or about the 22nd day of July 1985 did possess material that shows a minor who is not the person's child or ward in a state of nudity, to wit: possessed Polaroid photographs which depicted a minor male child in a state of nudity in violation of O. R. C. # 2907.323 A-3 m-1.

Complainant Det. James A. Phillips, C.P.D.

Sworn to and subscribed before me, this 22 day of July A.D., 1985

TED HYSELL
Clerk of the Franklin County
Municipal Court

By /s/ [Illegible], Deputy

FRANKLIN COUNTY MUNICIPAL COURT

September 24, 1985

(Title Omitted in Printing)

EXCERPTS OF TRIAL TRANSCRIPT

Filed November 19, 1985

• • • •

Direct Examination by Mr. O'Brien

• • • •

[51] Q. What level was the defendant's apartment on? ground floor? upper level?

A. It was an upper level, second floor.

Q. What area of the residence did you search?

A. The front room, sir.

Q. Detective Munsch, can you tell me what area of the apartment he searched?

A. The second room back, or the middle room, I guess you would call it.

Q. Did Detective Munsch provide to you an item during the course of that search?

A. Yes, sir, he did.

Q. Okay. Referring to an item that's been marked for identification purposes as State's Exhibit 1, is that item familiar to you?

A. Yes, sir. That's the item that he gave to me.

Q. Okay. Would you hold that up so the jury can seen what you're talking about?

A. (Witness complied.)

Q. And is that the photo album that Detective Munsch provided to you on July 22 of this year?

[52] A. Yes, sir, it is.

Q. Did you go through that photo album when Detective Munsch gave it to you?

A. Yes, sir, I did.

Q. Okay. Referring through that photo album, there are a group of four photographs partway through that album. I want you to look at those four photographs and tell me if you observed them on July 22 when Detective Munsch brought this album to you at the defendant's home.

A. Yes, sir, we did. As we went through, we observed these, yes.

Q. And they are marked in that photo album as State's Exhibits 1A, 1B, 1C, and 1D; is that correct?

A. Yes.

Q. And are those the same photographs—

A. Yes.

Q. —1A through D, that were in that photo album that Detective Munsch provided to you on July 22?

A. Yes, sir, they are.

Q. And upon observing those photographs, did you have a conversation with the defendant, Clyde Osborne, about them?

A. Yes, I did.

Q. Did you show him those four photographs that are in that book?

[53] A. Yes, sir. And we questioned him as to the name of the individual in the photographs.

Q. Are there any markings on any of those four photographs on those pages?

A. There is markings on the one photograph, State's Exhibit 1D, on the back of the photograph.

Q. And what marking is that?

A. The marking "Tommy-13."

Q. What's depicted in that State's Exhibit 1D?

A. This is a male, obvious male nude photograph from approximately the breast down, from the breast down to about the knees.

Q. Okay. Referring to State's Exhibit 1A, the photograph there, will you tell us what's shown in that?

A. This is a full-length shot of a young male, nude, with an erection.

Q. And is he standing? sitting?

A. He's laying—

Q. MS. MALLORY: Excuse me, Your Honor, but I'm going to object to this line of questioning. If the picture is admitted, the jurors are going to see the picture. I don't think they need a description of what each picture is.

THE COURT: And I assume your objection is on the grounds that the photographs will speak for themselves.

[54] MS. MALLORY: Yes, Your Honor.

THE COURT: On that grounds, I will sustain the objection.

MR. O'BRIEN: Thank you, Your Honor.

Q. Those four photos are the actual photos that were in the defendant's home that day; is that correct?

A. Yes, sir, uh-huh.

Q. Now, did you ask Mr. Osborne who that young man was in Exhibits 1A through C?

A. I asked him if he had the name of the young boy.

Q. And what did he say?

A. He said, no, he didn't know his name.

Q. Did the defendant tell you where he got those photographs?

A. He said that these photographs were taken and came from another state.

Q. What other state?

A. Florida.

Q. Did he say how long he had had those photographs?

A. For some time.

Q. Did you question Mr. Osborne as to his knowledge about the age of that young man in—

A. Yes, I did. And Mr. Osborne's reply or answer was, at the time the photograph was taken, the boy was 14.

Q. Does it appear to you that it's the same series [55] or group of photos, 1A through C, as distinguished from 1D?

A. Mr. O'Brien, no, it would be hard for me to determine.

Q. Are 1A through C Polaroid photographs?

A. Yes.

Q. Is 1D a Polaroid?

A. No.

Q. So there is that one difference?

A. Yes.

Q. There are no markings on 1A through C?

A. No.

Q. Did you have other conversation with Mr. Osborne about that—those group of four photographs?

A. No, no extended conversation. As I recall, you had some conversation with him.

Upon me asking him if he had this boy's name or who this boy was, and he said, no, he didn't know his name, upon him giving me his age, that was pretty much the extent of it until we went to headquarters.

Q. Now, before you started asking these questions, did you advise him of his rights?

A. Yes, sir, I did.

Q. Did you have conversation with the defendant about any children that he might have?

A. Yes, we did. Questioned him if he had any [56] children. He indicated he had a foster son.

Q. Did he state that that young man in that photograph was his son or foster son?

A. No. He said his foster son was forty some years old at this time.

Q. Did he at any time indicate that that young boy in that photograph was his ward when the photos were taken or even on July 22?

A. No, he gave no indication at all of that.

Q. And he did not know the young man's name?

A. No.

Q. Did you ask him if he himself had taken that photograph?

A. Yes.

Q. And what was his response?
A. He said that he did not.
Q. But he had obtained them from Florida, did you say?
A. Yes.
Q. Now, since July 22 until today when you brought that photo album into court, where has that item been?
A. This album, the whole album, has been in my custody.
Q. And you brought it today to court with you?
A. Yes, sir.
[57] Q. Okay. The other contents in that photo album, can you generally describe them for the jury?
A. Generally describing the other photographs obtained in the album are primarily all males of various ages, mostly all nude or—yes, mostly all nude. That's basically what's in the album.
Q. You indicated that you spoke with the defendant at police headquarters later that evening?
A. Yes. We did not—Just brief conversation. We didn't even—As I recall, we didn't get into an interrogation at all. We felt that our conversation at his residence—And we advised him what we were going to do with the photographs, and we filed the affidavit in headquarters.
Q. Now, did the defendant make any statements as to ownership of that photo album?
A. He indicated it was his photo album, yes. And while we were at the residence, he indicated, upon questioned, if he had taken any of the photographs contained therein, and he said he had taken a few, yes.
Q. Okay. There on the witness table, also, is an item marked for purposes of identification as State's Exhibit No. 2. Can you tell me what that is?
A. Yes. This is a photocopy of an envelope and letter that was seized while executing the search warrant.

• • • •

Cross-Examination by Ms. Mallory:

• • • •

[62] Q. But you say he gave you an age of 14?
A. Yes.
Q. But yet he didn't know the person in the photograph?
A. Yes, ma'am. He indicated that the age was 14 at the time the photo was taken, were his exact words.
Q. Do you know how he would know that—
A. No, I have no idea.
Q. —since he doesn't even know who the person in the photograph was?
Since you weren't present when the photograph was taken and don't know anything about the circumstances surrounding it, how do you know it's not been touched up by some photography technique or a composite photo, or something?
A. I would have no knowledge if it was or it wasn't, ma'am. I'm not an expert in that field. I could tell that it was a Polaroid photograph and that was the extent of it.
Q. Okay. So you can't tell whether it is a real picture of a nude person or a composite or some other way?
A. I can tell it's a Polaroid picture, and I've seen enough to know if one has been touched up or not.

• • • •

Re-Direct Examination by Mr. O'Brien:

• • • •

[64] THE COURT: Would you wait until the witness gets through answering the question before you start asking the next one, because of this young lady?
MR. O'BRIEN: Yes, Your Honor.
Q. Have you seen a mannequin before, Detective Phillips?
A. Yes, I have.

Q. Does that look like a mannequin in any of those four photos?

A. No, sir.

Q. Now, did Mr. Osborne tell you in what state those pictures were taken?

A. I don't understand your question.

Q. Did he tell you where those pictures were taken or how he came into possession of them?

A. When I questioned Mr. Osborne, I asked him if he knew this boy's name. He said, "No, I don't know his name." I said, "Do you know his age?" He said, "He's 14 at the time the picture was taken."

Q. Did he say where the picture was taken?

A. He said the picture was taken in Florida.

Q. Did he say what kind of location in Florida?

A. He did not elaborate on that, no, sir.

Q. But he was aware it was taken in Florida?

• • • •

Re-Cross Examination by Ms. Mallory:

• • • •

[66] Q. Directing your attention back to July 22 of this year, did you have an occasion to go to 793 North Park Street here in Columbus?

A. Yes, I did.

Q. With Detective James Phillips?

A. Yes.

Q. Did you have a search warrant for that premises?

A. Yes, we did.

Q. Did you search that premises?

A. Yes, we did.

Q. What area of the residence did you search?

A. I searched the bedroom, which is adjoining the living room.

Q. Okay. Making reference to this sketch on that board, could you point to which room you were searching?

A. Yes. This room right here. (Indicated.)

Q. Okay. Will you indicate to us whether you found anything in that room?

A. Yes. In the desk, which was located at the foot of the bed, in one of the desk drawers I found a photo album. I also found correspondence and miscellaneous paperwork, including bills, with the name of Clyde Osborne on them on top of the desk.

• • • •

Direct Examination by Ms. Bennett:

• • • •

[80] Q. Okay. Are you married?

A. No, ma'am.

Q. Okay. I realize that this could be a little difficult to talk about, and we have talked about it throughout this trial here, but what is the reason—why are you not married at the present time?

A. Well, I never found anybody I considered right for me.

Q. What is your sexual preference at the present time?

A. Well, really I don't have any. I been—

Q. Could you explain that a little further?

A. Well, in my younger days, I was active gay.

Q. When you say younger, what do you mean by that?

A. Oh, around 40, 45, someplace along there.

Q. Okay.

A. And my preference at this time is to drift. It could go either way.

• • • •

Direct Examination by Ms. Bennett:

• • • •

[87] Q. How long ago did you put it in the album?

A. Oh, it's been well over three years ago.

Q. And when was the last time that you looked at this photograph album?

A. Oh, I think about six months ago, around the first of January, maybe in December.

Q. Did you remember that these photographs were even in the album?

A. No.

Q. Did you know that it was illegal to possess those photographs?

A. No, ma'am, I did not.

MR. O'BRIEN: Object and move to strike.

THE COURT: Sustained. His knowledge or lack of it is irrelevant.

MR. O'BRIEN: Thank you, Your Honor.

BY MS. BENNETT:

Q. Mr. Osborne, do you have a relationship with a younger man?

A. No.

Q. Have you had a sexual relationship with a younger man?

A. Years ago, yes.

Q. How old were you then?

[88] A. Oh, I suppose I was around 20, 25.

Q. Okay. Since you've—In the last, say, ten years, have you had a relationship with a younger man?

A. No.

Q. Thank you. All right. Going back to those four pictures, do you know how old that young man is?

A. Well, I was told he was 14 at the time the pictures was taken.

Q. But did you have any personal knowledge—

A. No.

Q. —as to the age of that?

A. No, ma'am.

MS. BENNETT: That's all I have for right now.

THE COURT: Cross-examine.

MR. O'BRIEN: Thank you, Your Honor.

* * * *

Cross-Examination by Mr. O'Brien:

* * * *

[88] Q. Mr. Osborne, who was it that gave you that group of photographs?

A. Well, it was a Jack Smith from Florida.

Q. Okay. Is that the same Jack Smith whose name is—

A. Right, right.

Q.—on that envelope that State's Exhibit 2 [89] here in the courtroom?

A. Right, right.

Q. Where does Mr. Smith live now?

A. Tarpon Springs, Florida; was Tarpon Springs, Florida.

Q. He gave that to you personally when he was up here in Columbus?

A. Right; among the others, yes.

Q. Did he give you others when he gave you those?

A. I mean the other three pictures.

Q. Okay. Did he give you others besides that group when he gave you that group?

A. Well, there were some, but I never kept them. I got rid of them.

Q. But you kept the ones that were in the album?

A. Yeah, 'cause he asked me to.

Q. He asked you to keep them?

A. (Witness nods.)

Q. Did he say why he was giving those photos to you?

A. Well, he said for safekeeping.

Q. For safekeeping. Did he tell you who the boy was in the photographs?

A. No.

Q. Did he say that he had taken the photos?

[90] A. I think he said that he had taken them, yes.

Q. That would be Jack Smith?

A. Right.

MS. MALLORY: I'm going to object and move to strike that as hearsay, as the defendant does not have any knowledge of who took the photos.

THE COURT: He is stating as to what he had been told.

MS. MALLORY: Well, that's hearsay.

THE COURT: I will overrule the objection.

BY MR. O'BRIEN:

Q. Make sure I understand correctly. Jack Smith told you he took these photographs, at least the three Polaroids?

A. Right.

Q. Who is the boy in it? He didn't tell you that?

A. He didn't tell me that, no.

Q. Did he tell you where they were taken?

A. I assume someplace in Florida. Of course, they could have been taken anyplace. He used to travel as a representative of the circuses, advance agent, you know, so he used to travel all up and down, coast to coast and north to south. I don't really know—He couldn't really explain where they were taken.

Q. Did he tell you they were taken in a motel?

[91] A. No.

Q. You kept these, then, after he gave them to you and mounted them in that album; correct?

A. Right.

Q. Back on July 22, were you living by yourself or with someone?

A. No, I had a roommate.

Q. Who was that?

A. Dale Rorabaugh.

THE COURT: Pardon me. Could you spell that name for the court reporter, please?

THE WITNESS: Dale, you'll have to spell it. R-o-r-a-b- —

MR. RORABAUGH: A-u-g-h.

THE WITNESS: —a-u-g-h.

Q. And is Mr. Rorabaugh living with you there on 2nd now?

A. No, ma'am—No, sir.

Q. Now, this photo album that we've talked about here in the courtroom, that is your photo album?

A. That is my photo album, right.

Q. And those four photographs that we're talking about, those are your photos?

A. Well, I don't consider them mine, no.

Q. Okay. You were keeping them for Jack?

[92] A. I was just keeping them for Jack, right.

Q. Smith?

A. Right.

Q. And you had been keeping them for Jack Smith for how long? three to four years?

A. Yeah, about that.

Q. Has Jack ever asked you for them back?

A. No.

Q. Have you talked to Jack during this four or five years?

A. I've written him. I haven't talked to him. Well, I'll take that back. I talked to him about four years ago on the telephone once.

Q. And he's never asked for them back?

A. He's never asked for them back, no.

Q. Now, referring to an item that's marked as State's Exhibit 1D, that also was in the album, wasn't it?

A. Right.

Q. Did Jack give you this photograph, Exhibit 1D?

A. Right.

Q. Is there anything written on the back of that?

A. Yeah, Tommy-13.

Q. Is that your handwriting?

A. No.

Q. Whose handwriting is that?

[93] A. I assume it's Jack's. I won't swear to it.

Q. Was that handwriting on it when Jack gave this photo to you?

A. Right.

Q. Did he give this photo to you at the same time he gave you the other three?

A. Right.

Q. Now, looking at State's Exhibit 1A, can you tell the jury what's in that photo?

MS. MALLORY: I'm going to object to this. Haven't we talked about the fact that the jury will see the photo and don't need to be told what's in it?

THE COURT: Overruled. This is cross-examination.

A. Well, it's a picture of a body with a hard-on, if you want to get technical about it.

Q. Just to be clear, that is a boy; it's not a mannequin?

A. Well, I don't know. It's hard to say. Looks like a boy to me.

Q. Okay. And when you say he has a hard-on, he has an erect penis?

A. Right, right.

Q. Now, what's he holding there in his left hand? Can you tell?

A. Oh, I don't know. It's hard to say. It could [94] be one of them things you use in the kitchen. It's hard to say. I couldn't tell you what it is.

Q. Okay. On Exhibit 1A, you can't tell what he's holding in his hand?

A. No. Something electrical; got an electric cord on it.

Q. Referring to State's Exhibit 1C, is that the same boy?

A. Right.

Q. Is he holding anything in his right hand?

A. Yeah.

Q. What is that?

A. It's one of them dilados [sic], or whatever they call them.

Q. What are they used for?

MS. MALLORY: I'm going to object to this. I see no relevance to this kind of questioning. The jury's going to get to look at the pictures.

THE COURT: Overruled.

MS. MALLORY: I'm going to object to Clyde being asked what that item is used for.

THE COURT: Overruled; if he knows.

BY MR. O'BRIEN:

Q. Clyde, can you tell what that—

A. Well, really, I've never used the things. I [95] don't know what they are used for.

Q. Well, what's the boy doing with it in that photograph?

A. Looks like he might have it up his—Of course, he could be just holding it there.

Q. What does he appear to be doing with it?

MS. MALLORY: I'm going to object to this again. The jury is going to see the pictures. I don't think we need to have a graphic description that's going to embarrass Mr. Osborne on the stand.

THE COURT: Overruled. You may answer, sir.

Q. Judge Pearson indicated you can answer the last question, Mr. Osborne, which is, what is the boy doing with that dildo in State's Exhibit 1C?

A. I said it appears—You can't tell for sure actually. You don't know whether it's penetration or not. He's just holding it up to his backside.

Q. Are his legs spread, I take it?

A. Yeah, his legs spread. But you can't tell from the picture whether there's any penetration. He could be holding it out two or three inches from himself.

Q. In that same photo, State's Exhibit 1C, is that electrical device you talked about earlier—can you see that in that picture?

A. Yeah, there's something laying there at the [96] side. Looks like a sander.

Q. Does it look like the same thing that's in Exhibit 1A?

A. Yeah, I guess it is.

Q. It does appear to be the same electrical device you referred to?

A. Yeah, right.

Q. So to make sure I understand you, Mr. Osborne, those were being kept, held, possessed by you at 793 Park Street back on July 22, those four photographs on that witness table?

A. Right, right.

Q. You did live at that residence?

A. Right.

Q. And that residence is here in Columbus; correct?

A. Right.

Q. That young boy is not your son, is he?

A. No.

Q. That young boy is not your ward, is he?

A. No.

MR. O'BRIEN: I have no other questions.

THE COURT: Any redirect?

MS. BENNETT: No further questions.

THE COURT: You may step down.

• • • •

FRANKLIN COUNTY MUNICIPAL COURT

(Title Omitted in Printing)

09-25-85

JUDGMENT ENTRY

JURY VERDICT: GUILTY 6 MONTHS IN FCCC $100 FINE PLUS COSTS NO FINDING OF ABILITY TO PAY FINES. NO 2 FOR 1 SUSPEND 10 DAYS FOR TIME SERVED. IMMEDIATE ENFORCEMENT APPEAL BOND $5000 CASH OR SURETY JUDGE PEARSON

THE ABOVE FINAL APPEALABLE ORDER FILED 09-25-85 (DATE) WITH CLERK OF COURTS—FRANKLIN COUNTY MUNICIPAL COURT.

TED HYSELL
Clerk

By: KAPEL
Special Deputy Clerk

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 85AP-945
(Regular Calendar)

STATE OF OHIO,
Plaintiff-Appellee,
v.

CLYDE OSBORNE,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

Filed June 10, 1986

For the reasons stated in the opinion of this court rendered herein on June 10, 1986, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed.

REILLY, NORRIS & LYNCH, JJ.

By /s/ Archer E. Reilly
JUDGE ARCHER E. REILLY

LYNCH, J., Retired, of the Seventh Appellate assigned to active duty under authority of Section 6(C), Article IV, Constitution.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

(Title Omitted in Printing)

OPINION

Rendered on June 10, 1986

Appeal from the Franklin County Municipal Court.

MR. RONALD J. O'BRIEN, City Attorney, MR. JAMES J. FAIS and MR. DAVID E. TINGLEY, for appellee.

MR. RICHARD CURTNER and MR. GERALD A. MOORE, for appellant.

REILLY, J.

This is an appeal from a conviction in the Franklin County Municipal Court for one count of illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(3).

Columbus police officers conducted a search of defendant's home pursuant to a search warrant issued by a judge of the Franklin County Municipal Court on July 22, 1985. They seized a photo album during the search that contained four photos, which were the subject of the conviction involving this appeal.

Several motions were filed prior to trial including a motion to dismiss, a motion to suppress the photographs,

and a motion for particular jury instructions. These motions were overruled. The cause proceeded to trial and a jury returned a verdict of guilty.

Defendant has timely appealed and advances the following assignments of error:

"I. Appellant's conviction for 'illegal use of a minor in a nudity-oriented material or performance,' pursuant to O.R.C. 2907.323(A)(3), violates appellant's rights under the First and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 11 and 16, of the Ohio Constitution, because this statute is unconstitutionally vague and overbroad on its face.

"II. Appellant's conviction for 'illegal use of a minor in a nudity-oriented material or performance,' pursuant to O.R.C. 2907.323(A)(3), violates appellant's rights under the First and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 11 and 16, of the Ohio Constitution, as applied to appellant because it punishes mere private possession of minor-nudity material.

"III. The trial court erred in overruling appellant's motion to suppress evidence obtained on the basis of the search warrant because the warrant's affidavit was facially defective, violating appellant's rights under the Fourth Amendment to the U.S. Constitution and Article I, Section 14, of the Ohio Constitution.

"IV. The trial court erred to the prejudice of the appellant by admitting into evidence, without authority to do so, irreelvant, unauthenticated photographs for the purpose of proving the age of the person depicted, thus denying the appellant a fair trial and due process of law as guaranteed by Article I, Section 16, of the Ohio Constitution and the Fourteenth Amendment of the U.S. Constitution.

"V. The trial court erred in overruling appellant's motion for a mistrial on the grounds that testimony volunteered by a police officer was in violation of a motion *in limine* ordering exclusion of evidence relating to postal inspectors, violating appellant's rights under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

"VI. The trial court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29(A) at the end of the state's evidence, violating appellant's rights under the Fourteenth Amendment and Article I, Section 16, of the Ohio Constitution.

"VII. The trial court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29(A) at the end of all the evidence because insufficient evidence of probative value was submitted as to several elements of the crime and because a conviction is against the manifest weight of the evidence, violating appellant's rights under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

"VIII. The trial court's refusal to charge the jury with appellant's requested special jury instructions denied appellant a fair trial in violation of the due process clauses of the Fourteenth Amendment and Article I, Section 16, of the Ohio Constitution.

"IX. Appellant's conviction for mere possession of 'minor-nudity' material, where appellant came into possession of such material years before O.R.C. 2907.323(A)(3) was enacted and where appellant's conduct is entirely passive, violates appellant's rights under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

The first and second assignments of error are considered together, as they are interrelated. Defendant contends that R.C. 2907.323(A)(3) is unconstitutionally vague and overbroad on its face and violates his right to privacy. R.C. 2907.323 provides, in pertinent part:

> "(A) No person shall do any of the following:
>
> "• • •
>
> "(3) Possess or view any material • • • that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:
>
> "(a) The material • • • is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material • • •.
>
> "(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material • • • is used • • •."

Defendant's challenges to the constitutionality of the statute were previously addressed by this court in two recent decisions: *State* v. *Modeen* (April 17, 1986), No. 85AP-907, unreported (1986 Opinions 831); and *State* v. *Sandera* (April 24, 1986), No. 85AP-594, unreported (1986 Opinions 942).

In *Modeen*, this court held that *New York* v. *Ferber* (1982), 458 U.S. 747, supports the determination that the United States Constitution does not provide First Amendment protection to a person privately possessing child pornography. This court also construed "state of nudity"

to only include lewd exhibitions of the genitals, thus defeating any overbreadth contention. In *Sandera*, we found that by considering the entire statute, it was apparent that the legislature had defined nudity-oriented material to apply to the depiction of nudity which is devoid of any legitimate purpose. The photographs involved in this case show a young boy in a state of nudity, lewdly exhibiting his genitals. The statute proscribes possession of such photographs.

Thus, defendant's first and second assignment of error are not well-taken.

Defendant contends in the third assignment of error that the court erred by overruling his motion to suppress evidence obtained on the basis of the search warrant. Defendant maintains that the warrant's affidavit is facially defective because it lacks any indication of when defendant came into possession of the photographs. Moreover, defendant claims that the affidavit contains hearsay which is not credible because it is exculpatory in nature.

The affidavit was signed by Detective James Phillips, who based his testimony on information he received from a Cleveland Postal Inspector, who had in turn received his information from a Florida Postal Inspector. The affidavit indicated that surveillance of an individual in Florida had resulted in the seizure of child pornography there from Jack Smith and another individual, Dan Knous, who had been arrested in Florida. Both men implicated the defendant as possessing negatives of child pornography. During a search of Smith's residence, pursuant to a federal search warrant, a mailing list was seized containing defendant's name and address. Further, a cancelled check made to the order of defendant and dated June 3, 1985 was also seized as part of the search.

Crim. R. 41(C) provides:

> "• • • The finding of probable cause may be based upon hearsay in whole or in part, provided there is

> a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. * * *"

Defendant asserts that the hearsay statements of Smith and Knous were not reliable because they were exculpatory in nature. The state contends these statements were reliable as they were against penal interests. It is noteworthy, however, that such statements were not the only evidence before the court. There was also the mailing list with defendant's name and a cancelled check. This other evidence, together with the statements of Smith and Knous was sufficient to establish probable cause when the totality of the circumstances test is applied as required by *Illinois* v. *Gates* (1983), 462 U.S. 213.

Defendant further contends that the search warrant affidavit is defective because it does not state when defendant came into possession of the negatives. Hence, there was no probable cause to believe defendant was still in possession at the time the affiant prepared the affidavit.

The facts in the affidavit indicate that Smith and Knous were arrested on July 19, 1985, three days before the warrant was issued. At that time, both men stated that defendant had the negatives. Although it was not established when defendant possessed them, there were sufficient facts to justify the issuance of the warrant. In *State* v. *Marko* (1973), 36 Ohio App. 2d 114, this court held that a search warrant is valid and the evidence on which it is based is not stale if law enforcement officers applied for the warrant as soon as they became aware of the location of the evidence. *Marko* involved a possessory crime which was held to be a continuing offense. This same rationale applies to the facts in the instant case.

Hence, defendant's third assignment of error is not well-taken.

Defendant maintains in the fourth assignment of error, that the court erred in admitting into evidence four photographs. Defendant contends these photographs were irrelevant and unauthenticated as required by Evid. R. 901.

This allegation is not well-taken. The photographs were relevant since defendant was charged with possessing material that showed a minor in a state of nudity. Possessing the photographs was, consequently, the substance of the charge, and the photographs were definitely relevant evidence. As to the authentication issue, defendant seems to contend that these photographs had to be authenticated by the photographer before they were admissible. Such a requirement would unduly limit the effect of R.C. 2907.323(A)(3). Detective Phillips testified that the photographs were found in defendant's home. Defendant also testified that the photographs were given to him by a friend, that he arranged them in a photo album and that the album was kept in his residence. This was sufficient identification to render the photographs admissible.

Defendant's fourth assignment of error is not well-taken.

Defendant contends in his fifth assignment of error that the court erred in failing to declare a mistrial when a witness testified in violation of a motion *in limine*. The court granted a motion *in limine* before trial excluding any evidence as to the basis for the search warrant. Defense counsel sought to exclude any evidence of additional federal charges regarding misuse of the mail. During the testimony of Detective Phillips, the officer was asked whether in executing the search warrant there were several officers present. Detective Phillips responded that there were three other officers and two postal inspectors. Following defense counsel's motion for a mistrial, the court, in denying the motion, found that the motion *in limine* barred evidence that the police had received any

information from the postal inspectors for the search warrant. The court further found that Detective Phillips' answer was not in direct violation of the order and was not prejudicial to defendant.

The trial court's ruling was correct. As stated in *State* v. *Hymore* (1967), 9 Ohio St. 2d 122, at 128:

> "The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere."

Considering the trial court's proper finding that this testimony was not in direct violation of the motion *in limine*, and that defendant was not materially prejudiced by this evidence, there was no abuse of discretion.

Defendant's fifth assignment of error is also not well-taken.

In the sixth and seventh assignments of error, defendant contends that the court erred in overruling his Crim. R. 29(A) motion for acquittal for several reasons. Defendant first claims that there was no evidence that the material he possessed showed a "*minor*" as required by R.C. 2907.323. Nevertheless, Detective Phillips testified that the defendant told him he thought the boy in the photograph was fourteen years old when the pictures were taken. Moreover, the photographs speak for themselves as they manifestly show a young boy. The defendant further contends that the state did not establish that the boy in the photographs was not the defendant's child or ward. Defendant himself testified that the boy was not in either category.

Finally, defendant maintains that the state failed to present any evidence that the exceptions in R.C. 2907.323 (A)(3) did not apply to defendant. A review of the transcript reveals that the state presented sufficient evi-

dence to establish a *prima facie* case against defendant; that he possessed a depiction of a child in a state of nudity and that the depiction involved lewdness, eroticism, lechery, salaciousness, voyeurism or other exploitive, unwholesome motivations. See *Sandera, supra.* If the defendant wished to contravene that *prima facie* case, it was incumbent upon him to introduce evidence that the depiction served one of the legitimate purposes set out in R.C. 2907.323(A)(3)(a) or (b).

Whereupon, defendant's sixth and seventh assignments of error are not well-taken.

Defendant maintains, in the eighth assignment of error, that the court erred in refusing to give requested instructions to the jury. Defendant requested the court to instruct the jury that a minor was a person not over fifteen years of age. Defendant cites R.C. 2907.04, 2907.21, and 2907.22 in support of his contention. R.C. 2907.04 defines corruption of a minor, whereas, R.C. 2907.21 and 2907.22 relate to prostitution. Although these statutes increase the penalty for conduct with minors less than sixteen years of age, the committee comments following thereafter explain that the prohibited conduct is considered more harmful to persons in early adolescence. They do not permit similar conduct with those over sixteen years of age. Thus, the term "minor" takes on an atypical meaning for purposes of those statutes, as it is only meant to refer to those under sixteen years of age.

The term "minor" is not specifically defined in the criminal code. Nonetheless, R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. * * *" The common and ordinary meaning of the term "minor" is a person under the age of eighteen years. This is the definition the court gave to the term "minor," which was a correct definition. Further there

was sufficient evidence for the jury to find that the boy involved in these photographs was not over fourteen years old.

Defendant also requested the court to read the entire statute in its charge to the jury. The court refused in the absence of evidence on any of the exceptions. Although it is perhaps a better practice to read the statute and exceptions together, considering this court's holding in *Sandera*, *supra*, there was no prejudicial error in this case by the court's refusal to do so. There was no evidence presented requiring the jury to determine whether one of the exceptions applied to defendant. Furthermore, the photographs plainly met the definition of lewd exhibition of genitals.

Defendant's eighth assignment of error is not well-taken.

In the final assignment of error, defendant asserts that his conviction violates due process because he came into possession of the prohibited material prior to the effective date of the statute. As noted above, a possessory offense is a continuing offense. Defendant was charged with possessing the materials on July 22, 1985. The evidence presented at trial was sufficient for the jury to find defendant guilty of the proscribed conduct. We find no denial of due process in this case.

Defendant's ninth assignment of error is not well-taken.

For the foregoing reasons, defendant's assignments of error are overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

NORRIS and LYNCH, JJ., concur.

LYNCH, J., retired, of the Seventh Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Constitution, in the Tenth Appellate District.

THE SUPREME COURT OF OHIO
COLUMBUS

1988 TERM

To wit: July 6, 1988

Case No. 86-1728

STATE OF OHIO,

Appellee,

v.

CLYDE OSBORNE,

Appellant.

JUDGMENT ENTRY

Certified by the Court of Appeals

This cause, here on certification by the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Appeals for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

(Court of Appeals No. 85AP945)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 6th day of July, 1988.

MARCIA J. MENGEL
Clerk

/s/ Rita A. Jackson
Deputy

THE SUPREME COURT OF OHIO

(Title Omitted in Printing)

Criminal law—Prohibition of possession or viewing of material or performance of minor in state of nudity—R.C. 2907.323(A)(3) is constitutional—"Minor," construed—Culpable mental state of recklessness required—"Proper purposes" exceptions are affirmative defenses.

O.Jur. 3d Criminal Law § 1860, 1877.6

1. R.C. 2907.323(A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.
2. The term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.
3. Recklessness is the culpable mental state required to constitute a violation of R.C. 2907.323(A)(3).
4. The "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are affirmative defenses within the meaning of R.C. 2901.05(C)(2).

(Nos. 86-1532 and 86-1728

Submitted May 3, 1988

Decided July 6, 1988.)

CERTIFIED by the Court of Appeals for Franklin County, Nos. 85AP-1033 and 85AP-945.

In case No. 86-1532, Columbus police officers applied for a warrant to search the residence of defendant-appellant, Denis Young. The facts contained in the affidavit for the warrant were provided to police by two male minors who had been arrested on separate occasions for being a runaway and for male prostitution, respectively. Both informants reported that they had been picked up by Young and taken to Young's home, that Young had taken nude photographs of them, and that they had engaged in sexual acts with Young. Further, both informants reported that they had observed photographs in Young's house of nude minors or of minors engaged in sexual activity.

The warrant was executed on March 21, 1985. Various items were seized, including four photographs of one of the informants. Young was subsequently charged with possession of material depicting a minor in a state of nudity in violation of R.C. 2907.323(A)(3).

Young filed a motion to dismiss the indictment on the basis that R.C. 2907.323(A)(3) is unconstitutional. He also moved to suppress the evidence seized pursuant to the search, alleging that the search warrant was issued without probable cause. Both motions were overruled, the motion to suppress after a hearing. Young thereafter entered a plea of no contest and was found guilty of the charge set forth in the indictment. Upon appeal, the court of appeals affirmed Young's conviction, upholding the constitutionality of R.C. 2907.323(A)(3).

In case 86-1728, Columbus police secured a warrant to search the residence of defendant-appellant, Clyde J. Osborne. The warrant was issued pursuant to an affidavit sworn by Detective James A. Phillips of the Columbus Police Department. The information recited in the affidavit was based on a conversation between Phillips and an Ohio postal inspector. The inspector informed Phillips that a Florida postal inspector had arrested two

persons in that state who, during interrogation, implicated Osborne as having photographic negatives of child pornography in his possession.

The warrant was executed on July 22, 1985, resulting in the seizure of, *inter alia*, photographs of nude male minors. Osborne was subsequently charged with a violation of R.C. 2907.323(A)(3).

Osborne filed various pretrial motions, including a motion to dismiss the indictment on the basis that R.C. 2907.323(A)(3) is unconstitutional, and a motion to suppress the evidence seized during the search. These motions were overruled and, after a jury trial, appellant was found guilty as charged.

Upon appeal, the court of appeals upheld the constitutionality of R.C. 2907.323(A)(3) and affirmed Osborne's conviction.

By separate entries, the appellate court, finding its judgments in case Nos. 86-1532 and 86-1728 to be in conflict with the judgment of the Court of Appeals for Hamilton County in *State* v. *Meadows* (Dec. 18, 1985), No. C-850091, unreported, certified the record of each case to this court for review and final determination.

Ronald J. O'Brien, city attorney, for appellee.

Andrea R. Yagoda, for appellant in case No. 86-1532.

Richard Curtner, for appellant in case No. 86-1728.

S. Adele Shank, for appellants.

DOUGLAS, J. The question certified to this court in the two cases before us today is whether the state, consistent with the First Amendment to the United States Constitution, may outlaw the private possession of child pornography. This question has since been answered in the affirmative in *State* v. *Meadows* (1986), 28 Ohio St. 3d 43, 28 OBR 146, 503 N.E. 2d 697. The syllabus in *Meadows* reads:

"R.C. 2907.322(A)(5), which prohibits the knowing possession or control of material which shows a minor

participating or engaging in sexual activity, masturbation, or bestiality, does not violate the First Amendment to the United States Constitution, as made applicable to the states by reason of the Fourteenth Amendment. (*Stanley* v. *Georgia* [1969], 394 U.S. 557, and *New York* v. *Ferber* [1982], 458 U.S. 747, construed, harmonized and followed.)"

Our ruling in *Meadows* concerned the constitutionality of R.C. 2907.322(A)(5), while the cases before us today involve a related statute, R.C. 2907.323(A)(3). However, shortly after *Meadows* was decided, this court issued judgment entries in two cases involving R.C. 2907.-323(A)(3), both of which were resolved solely on the authority of *Meadows*. *State* v. *Modeen* (1986), 28 Ohio St. 3d 64, 28 OBR 164, 502 N.E. 2d 634; *State* v. *Robinson* (1986), 28 Ohio St. 3d 65, 28 OBR 165, 502 N.E. 2d 634. Thus, the question certified to this court in today's cases has already been decided.

However, it is well-established that "[c]ertification of the record of a case to the Supreme Court because of conflict between judgments of Courts of Appeals upon any question, brings the entire case before the Supreme Court for review." *Couk* v. *Ocean Acc. & Guar. Corp.* (1941), 138 Ohio St. 110, 20 O.O. 65, 33 N.E. 2d 9, paragraph one of the syllabus. On this basis, we turn now to a consideration of the remaining issues presented by the cases at bar.

In addition to the First Amendment issues resolved in *Meadows*, *supra*, appellants herein raise additional challenges to the constitutionality of R.C. 2907.323(A)(3) which were not addressed in that decision. In determining the validity of these challenges, we must remain mindful that all legislative enactments enjoy a strong presumption of constitutionality. *State, ex rel. Dickman* v. *Defenbacher* (1953), 164 Ohio St. 142, 57 O.O. 134, 128 N.E. 2d 59, paragraph one of the syllabus.

Appellants first argue that R.C. 2907.323(A)(3) violates the constitutional prohibition against vagueness and overbreadth. The statute provides in pertinent part:

"(A) No person shall do any of the following:

"* * *

"(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

"(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

"(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."

Appellants contend that the statute is overbroad because it sweeps within its ambit other activities that constitute an exercise of constitutionally protected expression. For example, the use of the term "nudity" is challenged as overly broad, since that term encompasses morally innocent states of nudity as well as lewd exhibitions. Thus, it is argued, the statute fails to define in a sufficiently narrow manner the criminal conduct it prohibits. See, *e.g.*, *N.A.A.C.P.* v. *Button* (1963), 371 U.S. 415.

We do not agree with this analysis. The First Amendment doctrine of overbreadth is limited in its application to laws in which the deterrence of protected activities is

substantial. Where, as here, a statute regulates conduct rather than pure speech, its overbreadth "* * * must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma* (1973), 413 U.S. 601, 615. For the following reasons, we find that R.C. 2907.323(A)(3) is not constitutionally infirm on the basis of overbreadth.

It is true that R.C. 2907.323(A)(3) does not expressly limit the prohibited state of nudity to a lewd exhibition or a graphic focus on the genitals. Furthermore, we are aware that "* * * nudity, without more is protected expression * * *," even where the subject depicted is a child. *New York* v. *Ferber* (1982), 458 U.S. 747, 765, fn. 18. However, when the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct narrows significantly. The clear purpose of these exceptions, quoted *supra*, is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, *i.e.*, the possession or viewing of the described material for prurient purposes. So construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography.

In the area of child pornography, the United States Supreme Court has directed that "[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written *or authoritatively construed.*" (Emphasis added.) *Ferber*, *supra*, at 764. As we construe it today, R.C. 2907.323(A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and

where the person depicted is neither the child nor the ward of the person charged.

Appellants further argue that R.C. 2907.323(A)(3) is impermissibly vague in that the term "minor" is not defined with sufficient precision. Appellants contend that in using only the term "minor" without elaboration, the statute fails to limit its proscription to "* * * works that *visually* depict sexual conduct by children below a specified age" (emphasis *sic*) as mandated by *Ferber*. *Id.* at 764. We cannot agree.

A criminal statute is impermissibly vague only where it is so imprecise and indefinite that persons of ordinary intelligence "* * * must necessarily guess at its meaning and differ as to its application." *Columbus* v. *Thompson* (1971), 25 Ohio St. 2d 26, 54 O.O. 2d 162, 266 N.E. 2d 571, syllabus. See, also, *Connally* v. *General Constr. Co.* (1926), 269 U.S. 385, 391. While R.C. Chapter 2907 does not define the word "minor," this omission is not fatal. Any term which is not defined by a statute is accorded its common, ordinary meaning. *State* v. *Dorso* (1983), 4 Ohio St. 3d 60, 62, 4 OBR 150, 152, 446 N.E. 2d 449, 451. We encounter no difficulty in finding the term "minor" to be generally understood as signifying a person who has not yet attained the age of majority. See Webster's Third New International Dictionary, Unabridged (1986) 1439. The age of majority in Ohio is eighteen. R.C. 3109.01. Therefore, the term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.

Appellants next argue that R.C. 2907.323(A)(3) lacks a requirement of scienter and is therefore unconstitutional. Appellants rely on the statement of the *Ferber* court at 765 that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."

Our review of R.C. 2907.323(A)(3) reveals that no particular degree of scienter is specified. The statute differs in this respect from R.C. 2907.321 and 2907.322, which both require "knowledge of the character of the material or performance involved * * *." However, the omission of this element from the delineation of the offense does not render the statute fatally flawed. R.C. 2901.21(B) provides:

"When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. *When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.*" (Emphasis added.)

As noted above, R.C. 2907.323(A)(3) does not specify any degree of culpability. Nor does it "* * * plainly indicat[e] a purpose to impose strict liability * * *" Therefore, pursuant to R.C. 2901.21(B), the degree of culpability required to commit the offense is recklessness. *State* v. *Adams* (1980), 62 Ohio St. 2d 151, 16 O.O. 3d 169, 404 N.E. 2d 144; *State* v. *O'Brien* (1987), 30 Ohio St. 3d 122, 124, 30 OBR 436, 437, 508 N.E. 2d 144, 146.

The term "recklessness" is defined in R.C. 2901.22(C):

"A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

This standard of recklessness is sufficient, in our view, to satisfy the requirement in *Ferber* of "some element of scienter." *Id.* at 765. Scienter is the equivalent of guilty

knowledge. *State* v. *Jacobellis* (1962), 173 Ohio St. 22, 18 O.O. 2d 207, 179 N.E. 2d 777, paragraph two of the syllabus, reversed on other grounds (1964), 378 U.S. 184. In *Jacobellis*, this court construed the term "knowingly possess," as used in R.C. 2905.34 (since repealed), as including *both* scienter (guilty knowledge) *and* "mens rea" (guilty purpose). *Id.* Thus, scienter may be a lesser standard than that contained in the term "knowingly." We cannot require the state to prove that the defendant possessed the material in question "knowingly," because innocent motive or purpose is irrelevant to the existence of knowledge as defined in R.C. 2901.22(B). *State* v. *Wenger* (1979), 58 Ohio St. 2d 336, 339, 12 O.O. 3d 309, 311, 390 N.E. 2d 801, 803, fn. 3. By contrast, a motive or purpose may be highly significant to a determination of whether a defendant has violated R.C. 2907.323(A)(3). For example, the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) excuse possession of otherwise outlawed material where the motive or purpose is innocent. Therefore, the degree of culpability required by R.C. 2907.323(A)(3) is something less than "knowing" possession.

We note that R.C. 2901.22, which defines the various levels of culpability, ranks "recklessly" just below "knowingly" in degree. R.C. 2901.22(E). The definition of recklessness in R.C. 2901.22(C) speaks of a perverse disregard for a *known* risk. Thus, "some element of scienter" is involved, which is that that *Ferber* requires. Accordingly, we find that recklessness is the culpable mental state required to constitute a violation of R.C. 2907.323(A)(3). Implicit in this requirement is the necessity of proving that the defendant had some notice of the character of the material possessed. Our reading of the statute as a whole clearly indicates that only those who are on notice as to the illicit character of the material are subject to criminal penalties. The inclusion of the proper purposes exceptions demonstrates that criminal liability

attaches only where possession can have no legitimate purpose.

The state may prove the required notice by demonstrating, for example, the defendant's attempts to conceal the material or to disguise his ownership, his possession of a massive amount of such material, or the obviousness of the character of the material. *Mishkin* v. *New York* (1966), 383 U.S. 502, 511. The state need not prove that the accused was aware of the *actual content* of the material, but only that he was on notice as to its nature or character. See *State* v. *Burgun* (1978), 56 Ohio St. 2d 354, 363-364, 10 O.O. 3d 485, 490-491, 384 N.E. 2d 255, 262.

Appellant Osborne contends that the trial court erred in overruling his motion for acquittal since the essential element of scienter was not proven at trial. However, our review of the record reveals that appellant never objected to the omission of this element from the charge to the jury. Appellant's own proposed jury instructions were completely silent on the element of scienter. Where a party complaining of error could have called, but did not call, the error to the trial court's attention at a timely juncture, the error is waived. *State* v. *Williams* (1977), 51 Ohio St. 2d 112, 5 O.O. 3d 98, 364 N.E. 2d 1364, paragraph one of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911. In such a case, the alleged error may warrant reversal only if it rose to the level of plain error and prejudiced appellant. *State* v. *Adams*, *supra*, at 153, 16 O.O. 3d at 170, 404 N.E. 2d at 146.

In concluding that the omission of the element of recklessness herein does not constitute plain error, we find support in *Adams*, *supra*. There, the essential element of recklessness was also omitted from the jury charge without a defense objection. This court held that this omission did not *per se* constitute plain error. *Id.* at paragraph two of the syllabus. A case-by-case approach was adopted, in which the record of the case is reviewed to determine whether a manifest miscarriage of justice will result if the conviction is permitted to stand. *Id.* at paragraph three of the syllabus. Our review of the record reveals that appellant himself testified that he gathered the photographs that were the basis of the charge and mounted them in an album, that he had last looked at the album about six months before, and that he had been told that the subject of the photographs was fourteen years old. The photographs themselves depict a nude boy, obviously a minor, in various lewd poses. Given this state of the record, we have no difficulty finding that the jury would have believed, beyond a reasonable doubt, that appellant was aware of the nature of the photographs in his possession. Accordingly, appellant would still have been convicted if a proper instruction on recklessness had been given, and his conviction must stand. *State* v. *Underwood* (1983), 3 Ohio St. 3d 12, 3 OBR 360, 444 N.E. 2d 1332, syllabus.

Appellant Young contends that the indictment in his case is fatally defective, in that no mention is made therein of any element of scienter. The indictment in question states in pertinent part that Young "did possess material that shows a minor * * * in a state of nudity * * * in violation of O.R.C. § 2907.323(A)(3) * * *." In rejecting appellant's contention, we note that appellant pleaded no contest to the charge in the indictment. A plea of no contest "* * * is an admission of the truth of the facts alleged in the indictment * * *." Crim. R. 11(B)(2). By conceding the truth of the facts set forth in the indictment, appellant admitted that the material that formed the basis for the charge was in his possession. In order to admit that the material described in the indictment was in his possession, appellant necessarily admitted his awareness of the possession, and of the nature, of the material described. Our review of the record

reveals that the photographs in question [1] obviously depict a minor in a state of nudity, which in at least one instance constitutes a graphic focus on the genitals. Appellant's conviction must stand.

Appellants next argue that R.C. 2907.323(A) is unconstitutionally vague because it fails to specify whether the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are negative elements to be proven by the state, or affirmative defenses, which

[1] Appellant Young contends that the court of appeals erroneously considered these photographs since they were not properly admitted into evidence. The photographs were not marked as state exhibits or formally introduced and admitted. However, we agree with the state's argument that it is not necessary to formally mark, introduce and admit items of evidence when a no contest plea is entered under Crim. R. 11 and R.C. 2937.07.

Crim. R. 11 provides in pertinent part:

"(B) Effect of guilty and no contest pleas. * * *

"* * *

"(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information or complaint * * *."

R.C. 2937.07 provides in pertinent part:

"If the plea be 'no contest' or words of similar import in pleading to a misdemeanor, it shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of circumstances, and if guilt be found, impose or continue for sentence accordingly. * * *"

Crim. R. 11 requires that the defendant accused of a felony be informed of the effect of a plea of no contest. Crim. R. 11(C)(2). Under R.C. 2937.07, the judge may make a finding of guilty from the explanation of the circumstances. Neither provision requires a formal admission of exhibits.

Our review of the record reveals that the photographs were discussed by the parties at the hearing. They were properly considered by the trial court as part of the explanation of the circumstances of the no contest plea. See *Cuyahoga Falls* v. *Bowers* (1984), 9 Ohio St. 3d 148, 9 OBR 438, 459 N.E. 2d 532. As such, they were properly considered on appeal, even though they were not formally admitted as record exhibits.

must be proven by the accused. However, we find that the "proper purposes" exceptions are clearly intended to be affirmative defenses.

R.C. 2901.05(C) defines an "affirmative defense" as "* * * either of the following:

"(1) A defense expressly designated as affirmative;

"(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

Neither R.C. 2907.323(A)(3)(a) nor (b) expressly designates the exceptions contained therein as affirmative defenses. However, the exceptions clearly constitute excuses or justifications for the possession of otherwise outlawed material, as they comprise circumstances under which the possession would be legitimate. The existence or nonexistence of a proper purpose is certainly a matter "* * * peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." While proof of proper purpose may come from objective sources, the accused will know better than any other person whether a proper purpose exists, and will be in the best position to adduce relevant evidence. See *State* v. *Doran* (1983), 5 Ohio St. 3d 187, 193, 5 OBR 404, 409-410, 449 N.E. 2d 1295, 1300. Therefore, we hold that the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are affirmative defenses within the meaning of R.C. 2901.05(C)(2). Accordingly, the burden of proof rests with the accused. R.C. 2901.05(A).

Appellant Young's final argument regarding the constitutionality of R.C. 2907.323 posits that the sentencing provisions of that statute are disproportionate and constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution. Young contends that since the offense of possessing material

showing nude minors is less serious that the offenses set forth in R.C. 2907.321(A)(5)[2] and 2907.322(A)(5),[3] the punishment should be proportionately less severe. Each of these offenses constitutes a misdemeanor of the first degree unless the the defendant has previously been convicted of the same offense, in which case the subsequent offense is elevated to a felony of the fourth degree. See R.C. 2907.321(C), 2907.322(C) and 2907.323(B).

"A punishment does not violate the constitutional prohibition against cruel and unusual punishments, if it be not so greatly disproportionate to the offense as to shock the sense of justice of the community." *State* v. *Chaffin* (1972), 30 Ohio St. 2d 13, 59 O.O. 2d 51, 282 N.E. 2d 46, paragraph three of the syllabus.

R.C. 2907.323(B) does not mandate a minimum sentence. The trial court, in imposing sentence, may exercise a considerable degree of discretion in determining the precise sentence to impose in a particular case. The court is fully empowered to tailor the punishment to the facts of the case before it, utilizing the usual sentencing criteria set forth in R.C. 2929.13 and 2929.22. Thus, while the classification of the offenses is identical, the punishments may vary considerably according to the circumstances of each case. Moreover, the offense of which appellants have been convicted is a morally abhorrent act made possible only through the cruel exploitation of innocent, abused children. By providing for the possibility of a maximum term of imprisonment of six months for first offenders, R.C. 2929.21(B)(1), the legislature intended not only to express the moral outrage of the community, but also to deter the purchase and possession of child pornography, so that the financial incentive to produce such material would be destroyed. The General Assembly has chosen to prohibit possession as a means of combating the sexual abuse and exploitation of our children. *State* v. *Meadows*, *supra* (28 Ohio St. 3d), at 51, 28 OBR at 153, 503 N.E. 2d at 704. This court is not prepared to state that the punishment imposed for possession of child pornography is disproportionate to the seriousness of the offenses.

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[2] R.C. 2907.321 provides in pertinent part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(5) Possess or control any obscene material, that has a minor as one of its participants * * *."

[3] R.C. 2907.322 provides in relevant part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(5) Possess or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality * * *."

The First Amendment must remain inviolate. We do not compromise that statement when we find that obscenity is not protected by the First Amendment. *Roth* v. *United States* (1957), 354 U.S. 476, 14 O.O. 2d 331. Likewise, child pornography also is not, and should not be, protected. The state has a compelling interest in the protection of children. Reasonable laws prohibiting the exploitation of children may be passed by the General Assembly to insure that interest.

Appellant Young next argues that the trial court erred in overruling his motion to suppress the photographs seized pursuant to the search warrant, alleging that the information in the underlying affidavit was stale and failed to establish probable cause for the issuance of a warrant. Specifically, appellant alleges that the information in the affidavit was based on statements from two witnesses, one of whom did not give dates for his observation of alleged child pornography in appellant's home, and another whose observations occurred approximately three months before execution of the warrant. We do not agree that this information was so "stale" that the

issuing magistrate had no reasonable basis for believing that the materials observed by the two witnesses would still be found at Young's residence. The affidavit recites in detail the circumstances surrounding the observations of the witnesses. It recites that both informants had been "picked up" by Young, who paid them to perform sex acts and to pose in the nude for photographs; that the area specified is known to the affiant as a "pick up spot" for young male prostitutes; that the witnesses had both observed similar material depicting nude minors in Young's home; and that psychological profiles of pedophiles reveal that they do not destroy their child pornography, but rather re-live their sexual experiences through photographs of previous partners.

The alleged staleness of the witnesses' information does not, in our view, affect the validity of the warrant. We note that the affidavit was sworn to within one week after the first witness was interviewed. Given the facts detailed in the affidavit, the issuing magistrate had probable cause for believing the materials described could still be found where they had been observed. In so finding, we are mindful that affidavits for search warrants "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. * * * A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca* (1965), 380 U.S. 102, 108. Under the circumstances of this case, which involves an offense of a continuing nature, we believe that the facts stated in the affidavit justified a finding of probable cause at the time of the issuance of the warrant. *Sgro* v. *United States* (1932), 287 U.S. 206, 210.

Appellant Osborne also attacks the sufficiency of the affidavit underlying the warrant issued in his case. Osborne contends that the affidavit failed to establish probable cause since the information therein was based on unreliable hearsay, and that the affidavit did not specify

the time during which the alleged criminal activity took place. As to the time aspect, appellant's contentions are utterly baseless. In a detailed description of the circumstances giving rise to the affiant's belief that Osborne possessed child pornography, it is stated that a few days before the affidavit was sworn, two witnesses stated that the material in question was *at that time* in the possession of appellant. As to the hearsay element, we note that the use of information based on hearsay is permissible as long as the issuing magistrate is informed of some of the circumstances underlying the informant's conclusion that the contraband was where he claimed it to be, and why the affiant found the informant credible. *Aguilar* v. *Texas* (1964), 378 U.S. 108, 114. We find that the affidavit in question passes muster on both counts. Both witnesses named appellant and correctly described his whereabouts. Appellant was also described as an "associate" of one of the witnesses who had just been arrested after a search of the premises retrieved a massive amount of child pornography. A cancelled check made out to appellant, showing appellant's address, was also found on the premises, as well as a mailing list containing the name and address of appellant. These facts gave the magistrate a basis for believing that the informants had reason to know that the contraband was where they claimed it to be, and provided corroboration for the affiant's conclusion that this information was worthy of belief. Thus, the affidavit enabled the magistrate to make a neutral determination of probable cause based on the totality of the circumstances. *Illinois* v. *Gates* (1983), 462 U.S. 213.

Appellant Osborne next contends that the photographs seized in the search were improperly admitted into evidence. He seems to argue that the photographs had to be identified and authenticated by the photographer before they could properly be deemed admissible. This argument borders on the frivolous. The relevance of the photographs is not dependent on whether they accurately depict the subject matter portrayed, but on whether ap-

pellant possessed the photographs and whether they are the sort of material outlawed by R.C. 2907.323(A)(3). Verification by the photographer would have no bearing whatsoever on these isues.

Appellant Osborne further argues that no proof was offered that the subject in the photographs was a minor. We cannot agree with appellant's contention that the minority of the person depicted was not demonstrated in the evidence. The majority of the photographs speak for themselves. The person depicted is obviously under the age of eighteen by a substantial margin, and a jury would have been clearly justified in finding, beyond a reasonable doubt, that the subject was a minor. As possession of these photographs alone would support appellant's conviction, we need not consider whether the state proved the minority of the subject in the sole remaining photograph.

Appellant Osborne argues that the trial court erred in failing to instruct the jury that the term "nudity" as used in R.C. 2907.323(A)(3) refers to a lewd exhibition of the genitals. However, since appellant neither requested such a charge nor objected to the instructions as given, any claim of error has been waived. Crim. R. 30; *State* v. *Underwood*, *supra*. Nor does the plain error exception have any relevance here, as the outcome of the trial would clearly have been the same had the trial court instructed the jury that lewdness is a necessary element of nudity under R.C. 2907.323(A)(3), as we hold today. We find that no reasonable juror could believe that the photographs involved herein were anything but a lewd display. See *Underwood*, *supra*, at syllabus.

Accordingly, based upon the foregoing, the judgments of the court of appeals are hereby affirmed.

Judgments affirmed.

MOYER, C.J., SWEENEY, LOCHER, HOLMES, WRIGHT, and H. BROWN, JJ., concur.

THE SUPREME COURT OF OHIO
COLUMBUS

(Title Omitted in Printing)

REHEARING ENTRY

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 31st day of August, 1988.

MARCIA J. MENGEL
Clerk

/s/ Rita A. Jackson
Deputy

THE SUPREME COURT OF OHIO
COLUMBUS

(Title Omitted in Printing)

ENTRY

UPON CONSIDERATION of the motion filed by counsel for appellant to withdraw this Court's mandate to the Court of Appeals, or, to stay execution of the mandate, pending the appellant's appeal to The United States Supreme Court,

IT IS ORDERED that the motion for withdrawal of mandate be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that execution of the mandate and sentence be, and the same are hereby, stayed pending the timely filing of an appeal to The Supreme Court of the United States.

IT IS FURTHER ORDERED that if such appeal is timely filed, this stay shall continue for an indefinite period pending final disposition of this cause by The Supreme Court of the United States.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 12th day of October, 1988.

MARCIA J. MENGEL
Clerk

/s/ Rita A. Jackson
Deputy

SUPREME COURT OF THE UNITED STATES

No. 88-5986

CLYDE OSBORNE,

Appellant

v.

OHIO

Appeal from the Supreme Court of Ohio

ON CONSIDERATION of the motion of appellant for leave to proceed herein in forma pauperis and of the jurisdictional statement, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted limited to Questions I.(b), I.(d) and II. presented by the statement as to the jurisdiction. With respect to the additional questions presented, the appeal is dismissed for want of jurisdsiction and treating the papers whereon the appeal was taken as a petition for a writ of certiorari as to the additional questions presented, certiorari is denied.

June 26, 1989